NO. 72-624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICI CURIAE UNITED STATES STEEL CORPORATION AND WHEELNG-PITTSBURGH STEEL CORPORATION URGING AFFIRMANCE

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March 12, 1973

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QUESTIONS PRESENTED

1. Whether Defendant can be prosecuted for its failure to hold a permit under Section 13 of the Refuse Act of 1899 (33 U.S.C. § 407), for a discharge of treated wastewater with no tendency adversely to affect navigation alleged to meet applicable water quality criteria which took place in the summer of 1970 prior to the creation of a program for the issuance of permits governing such discharges.

2. Whether the Defendant's claim that it was affirmatively misled by the Corps of Engineers into believing that no permit from the Corps of Engineers was necessary to discharge into the Monongahela River treated wastewater with no tendency adversely to affect navigation is an adequate defense to the present prosecution.

STATEMENT OF THE CASE

Respondent, Pennsylvania Industrial Chemical Corporation (hereinafter referred to as "PICCO"), like each of the amici, owns and operates a manufacturing establishment on the Monongahela River south of Pittsburgh in the Western Pennsylvania area. It has two outfalls to the Monongahela River. One outfall, an iron pipe, carries cooling water and process water which has passed through an industrial waste treatment facility from the plant to the Monongahela River. The other outfall, a concrete pipe, carries to the river domestic wastes from several private dwellings in the vicinity of the plant as well as cooling water and treated process water from the plant. At the time of the events involved in the instant litigation, PICCO held permits from the Commonwealth of Pennsylvania for its use of the two outfalls. These permits provided that the discharge from these outfalls must comply with the water quality standards established by the Clean Streams Law of the Commonwealth of Pennsylvania, 35 Purdon's Statutes, § 691.1 et seq., and the regulations promulgated thereunder. The standards contained in the Pennsylvania regulation had been adopted by the Secretary of the Interior as the federal standards applicable to interstate waters in the Commonwealth of Pennsylvania in 1967 pursuant to the requirements of the Federal Water Pollution Control Act, as amended.* Hence, by complying with the terms of its permits, PICCO complied with both state and federal water quality standards governing its discharge into the Monongahela.

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*The Pennsylvania standards are adopted as the federal standards at 40 C.F.R., Ch. I, Part 120.10.

Statement of the Case.

PICCO was charged in the four-count information in the instant case with discharging into the Monongahela River certain "refuse" matter, "to-wit, iron, aluminum and compounds containing these chemicals, and chlorides, phosphates, sulphates and solids"** in violation of Sections 13 and 16 of the Rivers and Harbors Act of 1899, 33 U.S.C., Sections 407 and 411. The charges were based upon samples taken on August 7 and August 19, 1970. The information did not specify the quantity of these substances discharged or their effect on the waters of the Monongahela River. The information did not charge PICCO with pollution or with the deposit of materials deleterious to the river. It accused PICCO only of a discharge. It did not charge PICCO with any violation of either state or federal water quality standards, or of its permits for each of the discharge streams.

At the time of the trial the court refused to permit PICCO to show that its discharges were within the federal water quality standards applicable to the Monongahela River. It also refused to permit PICCO to offer evidence as to the effect of its discharges on the water of the Monongahela River. Although the court ruled that no discharge of any kind into the Monongahela River was lawful in the absence of a permit for such discharge issued by the United States Army Corps of Engineers, it refused to allow PICCO to show through witnesses and documents from the Corps of Engineers that the Corps had never granted a permit for a discharge such as that of PICCO from the date of the

**The second count included manganese in the list of elements.

enactment of the 1899 statute, and was neither prepared to process an application for nor to issue such a permit.

The case was sent to the jury with the instruction that any discharge from an industrial establishment, no matter how innocuous, was a violation of the criminal law of the United States, in the absence of a permit for it from the Corps of Engineers, regardless of whether the Corps of Engineers construed the statute to require such permits or was prepared to receive applications and issue permits. With such instructions regarding the statutory provisions, it came as little surprise that PICCO was convicted on all four counts. The district court judge imposed the maximum permissible fine.

PICCO then appealed to the United States Court of Appeals for the Third Circuit. That Court reversed. It held in effect that if the statute prohibited *all* discharges in the absence of a permit, then it was incumbent upon the Government to furnish a mechanism by which a responsible entity seeking to discharge an acceptable effluent into a waterway could obtain a permit, and that unless a mechanism existed by which PICCO could have obtained a permit for its discharge, the Government could not prosecute it under the 1899 Act. In the alternative, the Court of Appeals said that PICCO should have the opportunity to prove that it had been led to believe by the official regulations and by statements of responsible representatives of the Corps that no permit was necessary for the type of discharge which PICCO made.

INTEREST OF THE AMICI CURIAE

Criminal informations were filed against United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation in the United States District Court for the Western District of Pennsylvania on the same day as the criminal information involved in this matter was filed against PICCO. The informations involve discharges of substances with no tendency adversely to affect navigation in the summer of 1970 prior to the existence of a permit program for such discharges. United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation moved to dismiss the informations filed against them. Following argument on the motions to dismiss, the District Court entered an order deferring decision of the motions to dismiss until the decision of the Third Circuit Court of Appeals in this matter. No decision has yet been entered on the motions to dismiss and the amici are advised that no decision will be entered pending the resolution of the present matter by this Court. United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation believe the disposition of the informations filed against them is likely to be controlled by the action of this Court in the present matter. Therefore, they have obtained the consent of the Solicitor General and counsel for PICCO to file this brief as amici curiae.

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit correctly held that PICCO could not be prosecuted for the failure to hold a permit for the discharge into the Monongahela River in the summer of 1970 of treated process and cooling water with no tendency adversely to affect navigation if no mechanism existed by which PICCO could obtain a permit for such a discharge. This conclusion was sound because until December 23, 1970 when the President by Executive Order No. 11574 directed the creation of a permit program under § 13 of the Rivers and Harbors Act of 1899 for discharges such as that made by PICCO, reasonable men relying on the text, the legislative history, the judicial construction, and the administrative practice followed with regard to § 13, would not have believed that a permit was needed or was available for such a discharge.

If § 13 is regarded as prohibiting a discharge such as that made by PICCO, it is in conflict with the Federal Water Pollution Control Act, as amended, which at the time of the discharges involved in this matter permitted such discharges if they met water quality standards. The situation called for a judicial accommodation of the statutes. The Court of Appeals correctly reconciled this conflict by holding that prosecution for discharge was not permitted under Section 13 unless a mechanism existed by which those meeting water quality standards set pursuant to the Federal Water Pollution Control Act, as amended, could apply for and obtain permits.

The conviction of PICCO on the facts of the present case denied it due process of law because of the confus-

ing and conflicting demands of § 13 and the Federal Water Pollution Control Act, as amended and because of the misleading conduct of the Corps of Engineers with regard to the scope of Section 13.

The writ of certiorari should be dismissed as improvidently granted because the *PICCO* decision is without prospective effect, especially in light of the Federal Water Pollution Control Act Amendments of 1972 and because its correctness is confirmed by those amendments.

ARGUMENT

I. The Court of Appeals Correctly Held That Picco Could Not Be Prosecuted for Failure to Possess a Permit for Discharge Under Section 13 for It's Discharge Into the Monongahela River if no Mechanism Existed at the Time of the Discharge Through Which Picco Could Have Obtained a Permit.

The brief of the United States in this case represents an effort to persuade this Court to judge the conduct of PICCO in the summer of 1970 by standards first articulated by the Government in December, 1970. This effort must be patently offensive to reasonable men and the Court of Appeals quite properly rejected it. The Court of Appeals for the Third Circuit told the Government that it could not assess criminal penalties against PICCO for the failure to have a permit for the discharge into the Monongahela River of material with no tendency adversely to affect navigation if no mechanism existed by which PICCO could obtain a permit for such discharge. This proposition seems so obviously sound that one may wonder why it was necessary for the Court of Appeals to declare it. It seems a puzzle that the United States should prosecute a business entity, which held appropriate state permits incorporating both state and federal water quality standards for its discharge of treated waste-water and which was in the process of constructing upgraded treatment facilities, for failure to obtain a non-existing permit. It further seems anomalous that the Government at trial should have prevented representatives of the Corps of Engineers from giving testimony as witnesses on behalf of PICCO that the Corps had not given permits for dis-

charges such as that of PICCO and did not have administrative machinery to deal with applications for such permits. In order to understand why in the summer of 1970 PICCO and the Corps of Engineers shared an understanding of what Section 13 required which is so at variance with what the United States now contends for in its brief, it is necessary to examine the enactment, interpretation and administration of Section 13 prior to the Executive Order No. 11574 of December 23, 1970.

A. THE HISTORICAL BACKGROUND OF SECTION 13 CLEARLY INDICATED THAT IT WAS ADDRESSED TO PROTECTION OF NAVIGATION.

The history of legislation dealing with placing materials in the navigable waters of the United States began in 1877 when the Secretary of War sent to Congress a proposal drafted by the Chief of the Army Engineers to protect navigable waterways from obstruction. The draft was placed in the form of a bill, called the "Dolph Bill," and was introduced without result into Congress several times between 1877 and 1890. In the latter year, at the time Congress was considering the Rivers and Harbors Appropriation Bill of 1890, the Dolph Bill was added to the Appropriation Bill as an amendment and finally enacted on September 19, 1890 (26 Stat. 426; Act of September 19, 1890; c. 907). Section 6 of this Act (set out in full in Appendix "A" to this Brief) was clearly addressed to regulation of discharges with a tendency to obstruct navigation. The United States has never made a contention to the contrary.

In 1894, a similar section was added to the River and Harbors Appropriation Act of 1894 (28 Stat. 363; Act of August 18, 1894, c. 299). This provision is also set out in full in Appendix "A" of this Brief. It was patterned after a section of an earlier statute (Act of June 29, 1888, c. 496, § 1) which concerned only New York harbor and which can today be found at 33 U.S.C. § 441. The only exchange during the discussion of the bill which touched on the purpose of their provision showed clearly that it was addressed to discharges which might affect navigation. (See Appendix "B" to this Brief.)

In 1896 a group of mine operators applied to the Secretary of War for designation of an area of the New River in Virginia where they could dump ore washings without violating the 1894 Act. The Secretary determined that the discharge could be made in a way which would not affect the navigability of the river. However, because of opposition by parties contending that the discharge ". . . destroys the fish, pollutes the water so as to destroy its usefulness for domestic purposes, and injuries scenery along the stream . . . ," the Secretary asked the Attorney General whether he should consider matters other than the effect on navigation. The Attorney General replied:

> "You should be governed only by considerations affecting the navigation of the river and, if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must be presumed to have had in mind in authorizing the present and large expenditures which have been

made in the improvement of the river." (21 Op. Atty. Gen. 305, 308 (1896)).

In summary, it is clear that at the time of their enactment, the Acts of 1890 and 1894 were understood to be addressed only to the protection of navigation and not concerned with a discharge such as that made by PICCO consisting of dissolved material with no tendency adversely to affect navigation.

Because the provisions of the Acts of 1890 and 1894 considered above, as well as other provisions not relevant here, were scattered over many annual rivers and harbors appropriation bills, Congress in 1896 directed the Secretary of War (29 Stat. 234) to collect all federal statutes dealing with navigable waterways and to compile a draft statute which would incorporate all existing federal law on the subject. On February 10, 1897, the Secretary of War forwarded to Congress a compilation of existing statutes and a draft composed by the Chief of Engineers of a statute which purported to state the existing law (H. R. Doc. No. 293, 54th Cong., 2d Sess., 1896-97).

The Chief of the Corps of Engineers, in his report to the Secretary of the Army, referred specifically to Section 6 of the Act of 1890 and Section 6 of the Act of 1894, and then proposed what became § 13 of the Rivers and Harbors Act of 1899 in the exact form in which it now appears. When the draft of the Chief of Engineers was offered in Congress as a codification of existing law, the principal concern was that it be an accurate restatement of the existing statutes. See 32 Cong. Rec. 2296, 2297. That § 13 was intended to be a codification of § 6 of the Act of 1890 and § 6 of the Act of 1894 —

and nothing more — is a proposition that has never been questioned. And if one traces § 13 back to its origins in the Acts of 1890 and 1894, it is clear that the legislative intention was to regulate discharges obstructing or interfering with navigation.

This intention and understanding are strongly confirmed by a piece of subsequent legislation, Section 4 of the Rivers and Harbors Act of 1905, 33 U.S.C. § 419. This provision is expressly limited to conferring authority to prescribe regulations on the deposit of refuse in order to protect navigation. Section 4 began life as an amendment to Section 13 of the 1899 Act, and it is most clear that at all times it was understood as an implementation of § 13 to aid in enforcement. A reading of the discussion of § 4 at 39 Cong. Rec. 3230 (58th Cong., 3d Sess., Feb. 23, 1905), leaves no doubt that § 13 was understood to be concerned with the protection of navigation.

In summary, so far as the legislative history of § 13 is concerned, both the Corps of Engineers and PICCO were on sound ground in supposing that the statute had no application to discharges such as that made by PICCO and did not require the Corps to equip itself to issue permits for such discharges.*

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*Comment, "Discharging New Wine Into Old Wineskins: The Metamorphosis Of The Rivers And Harbors Act Of 1899," (Hereinafter "Discharging New Wine") 33 U. Pitt. L. Rev. 483, 494-507 (1972).

B. AT THE RELEVANT TIME, THERE WAS NO WELL-CONSIDERED APPELLATE COURT INTERPRETATION OF SECTION 13 WHICH ENLARGED ITS LANGUAGE TO INCLUDE THE REGULATION OF DISCHARGES NOT HAVING AN EFFECT ON NAVIGATION.

The view that § 13 has been or may be interpreted to prohibit discharges not having a navigational effect is often supposed to be supported by the decision of this Court in *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), and that case is carelessly cited as holding that § 13 is a "pollution" statute in the modern sense, see, *e.g.*, *United States v. Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me. 1971). In fact, *Standard Oil* held no such thing. As stated on page 5 of the brief filed on behalf of the United States in this Court in *Standard Oil*, "the only issue . . . was whether something which has not been discarded or rejected by its owner can constitute 'refuse matter.'" The argument of Standard Oil as appellant was that because the discharge consisted of commercially valuable gasoline, it could not be considered "refuse" under Section 13. This Court held that whether matter was "refuse" did not turn on a factual determination as to its value. Although Justice Douglas commented at 384 U.S. 229 on the unpresented issue of the application of § 13 to substances with no capacity adversely to affect navigation, the determination of *Standard Oil* that "refuse" could include substances which had a high commercial value before being thrown into the water did not resolve the issue.

In *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), decided six years before *Standard Oil*, *supra*, this Court dealt with the "streets and sewers" exception of Section 13. There the United States sought

an injunction to require the defendant and other manufacturers to remove solids which they had deposited in the Calumet River over a period of years and to restore the channel to a depth of 21 feet. The lower courts denied the relief.

The United States, in its petition for *certiorari* characterized the question involved as: "Whether the discharge of industrial waste from steel mills into the Calumet River, a navigable waterway of the United States, resulting in a reduction of the navigable capacity of the channel and providing a serious hazard to ships using it, is prohibited by federal law." The defendants contended that their discharges of particles in suspension fell within the exception of § 13 for materials passing from sewers in a liquid state. This Court rejected that contention.

Neither *Republic Steel* nor *Standard* Oil were holdings that § 13 regulates discharges with no tendency adversely to affect navigation.

Prior to the recent prosecutions brought under § 13, only a few reported decisions had dealt with the issue whether it applied to materials with no tendency adversely to affect navigation. In *Nicroli v. Den Norske Afrika-Og Australielinie Dampskibs Aktieselskab*, 332 F.2d 651 (2d Cir. 1964), the defendant argued that § 13 and § 1 of the Act of 1888, concerned with New York harbor, 33 U.S.C. § 441, prevented a shipowner from hosing spilled sugar from the deck of a ship into New York harbor. The Second Circuit examined the statutes and concluded at page 655:

> "Though the statutory language is broad, the purpose of these statutes is to prevent the dis-

charge of matter *which will clog or obstruct the harbor or other navigable waters.*" (Emphasis added)

Warner Quinlan Co. v. United States, 273 Fed. 503 (3rd Cir. 1921), was a case brought under the provisions of 33 U.S.C. § 441, which, as has previously been noted, is closely related to § 13. The court there concluded that: "Deposits which do not obstruct or injuriously affect the harbor are not prohibited by the Act."

At page 16 of its brief before this Court, the Government argues that courts of appeals early declined to limit Section 13 to a prohibition of discharges with a tendency to obstruct navigation. As the cases cited above show, this is not an accurate statement of historical fact. Moreover, an examination of several of the cases cited by the Government shows that they fail to support its position.

For example, in *Maier v. Publicker Commercial Alcohol Co.,* 62 F. Supp. 14 (E. D. Pa. 1945), *aff'd.,* 154 F.2d 1020 (1946), cited at page 16 of the Government's brief, the alleged violation of § 13 was the deposit through a city sewer into the Delaware River of some 9,190 tons of non-soluble grain residue and over 21,000 tons of grain residue in solution or suspension with the effect of filling the channel at one point to two feet above water level at low tide. Obviously, the court had no occasion to consider the application of § 13 to discharges with no tendency adversely to affect navigation.

United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952), involved the dumping of 6,700 barrels of fuel oil into a navigable waterway. The lower court as trier

of fact found that the oil which had been an inch thick on the water and covered boats had the nature and effect of impeding navigation. The defendant seized upon the conclusion of the district court that the oil impeded navigation and contended that this finding indicated its conviction must have been based on the provision of § 13 which is addressed to the placing of refuse on river banks, and that since the evidence showed no deposit of refuse on a river bank, the conviction could not stand. The real issue was whether reference by the trial court to the navigational effect of the discharge necessarily required the conclusion that the conviction had been under a limited portion of § 13, with the consequence that unless the discharge had been shown to be from a river bank, the conviction was erroneous. The answer, of course, was obvious — a navigation-obstructing discharge could be charged under § 13 regardless of whether the material was deposited on a bank or directly in the water. No one before the court argued that, or was concerned with the issue whether, the first part of § 13 was addressed *only* to materials with a tendency adversely to affect navigation and the holding of the court did not resolve the issue. It is worthy of emphasis that the same court in the later *Nicroli* case, *supra,* concluded that § 13 was *not* addressed to a discharge with no tendency adversely to affect navigation.

La Merced, 84 F.2d 444 (9th Cir. 1936), does say that the first clause of § 13 does not require that a discharge have a tendency to obstruct navigation in order to be refuse but the facts of the case *place* it in much the same category as *Ballard* and other oil spill cases. In holding that oil was "refuse" within the meaning of

§ 13, the Ninth Circuit relied upon two cases decided under the Act of 1888, dealing with New York harbor, *The Columbo,* 42 F.2d 211 (2d Cir. 1930), and *The Albania,* 30 F.2d 727 (S. D. N. Y. 1928), both of which stated that oil was in fact a danger to the use of a harbor for shipping.

In summary, the decisional law in the summer of 1970, taken as a whole and in the context of the factual situations before the several courts, gave no reason to the Corps of Engineers or PICCO to question the understanding that § 13 did not apply to a discharge such as that made by PICCO.

C. THE VARIOUS ARGUMENTS THAT HAVE BEEN ADVANCED SINCE 1970 TO SUPPORT THE PROPOSITION THAT § 13 IS ADDRESSED TO DISCHARGES WITH NO TENDENCY ADVERSELY TO AFFECT NAVIGATION ARE SPECIOUS AND WOULD NOT HAVE CAUSED A REASONABLE MAN TO ACCEPT THAT INTERPRETATION.

Since the Government launched its 1899 Act "pollution" prosecution program, it has made a valiant effort to bolster the conclusion that § 13 is addressed to discharges with no tendency adversely to affect navigation by a variety of arguments based upon deductions from provisions in the text of § 13 concerning other subjects. One such argument is that the provision of § 13 allowing the Chief of Engineers to issue permits for discharges on a finding that anchorage and navigation will not be impaired would not have meaning unless § 13 covers materials which would not impair anchorage or navigation. This argument ignores the practical administration of the 1899 Act. For example, a permit might allow the discharge of industrial solids on the condition that the channel be dredged periodically by the discharger in order to prevent actual interference with navigation or it might authorize discharge in an area outside the channel of navigation. Indeed, these examples are typical of the practice of the Corps of Engineers in 1970 and for 70 years before in connection with permits under other provisions of the 1899 Act than § 13.

Another such argument is the contention that the exception in § 13 for materials "flowing from streets and sewers and passing therefrom in a liquid state" shows that § 13 was addressed to liquid materials with no tendency adversely to affect navigation. The un-

stated premise in this argument — that material flowing from municipal streets and sewers in 1899 did not have a tendency to obstruct navigation — is shown to be of dubious validity by a report of the Rivers and Harbors Committee of the House some years later which observed:

> "In some instances the organic solid matter in sewage and wastes causes temporary shoaling in the vicinity of the point of discharge, but in most cases of this kind, nature eventually decomposes the organic matter and rectifies the condition. In a few instances, where large quantities of sewage are discharged into sluggish and restricted waters, over-pollution results and the oxygen content remains insufficient to enable nature to break up the solids. In such cases, permanent shoaling in the vicinity of the point of discharge results and dredging must be restored to. As a rule, dredging is well attended to by municipal authorities."*

Sewage was a physical threat to navigation if dumped in large masses into the waterways. The municipal corporations were permitted to continue their former practices of discharing into the water, providing the discharges were liquid enough to encourage the natural degradation and biological self-disposal of human wastes to occur. Thus, one aware of the facts concerning the disposal of municipal sewage, as the Corps undoubtedly was and is, would not have been led to the conclusion that § 13 was addressed to discharges with no tendency adversely to affect navigation.

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*H. R. Doc. No. 417, 69th Cong., 1st Sess. 9 (1926)

D. THE LONG-ESTABLISHED ADMINISTRATIVE INTERPRETATION OF SECTION 13 AT THE TIME OF THE DISCHARGES INVOLVED IN THIS CASE WAS THAT IT ONLY REGULATED DISCHARGES WITH A TENDENCY ADVERSELY TO AFFECT NAVIGATION.

Until the recent change of position by the United States with respect to Section 13, it is obvious from the published regulations of the Corps of Engineers that it understood § 13 to be addressed to discharges with a tendency adversely to affect navigation.

The United States concedes with exquisite reluctance at page 35 of its brief "that in defining its responsibilities under the 1899 statute as 'directed . . . principally against the discharge of those materials that are obstructive or injurious to navigation' (33 C.F.R. (1967 ed.) 209.395), the agency for many years viewed its role narrowly." While not literally a half-truth, or a malicious misstatement, it is hardly a candid acknowledgement of a fact which the hapless defendant in this case was denied any reasonable opportunity to prove — that neither the Corps of Engineers, nor the Department of Justice, nor thousands of reputable, law-abiding industries discharging various types of "used" water into streams had any idea that the Corps of Engineers had the power or the responsibility under the 1899 Act to act with reference to discharges having no potential for adversely affecting navigation.

The United States argues, however, that a revision of the regulations published in 1968 represented a clear change in position by the Corps of Engineers. In fact, the revisions represented no such thing.

The only mention of § 13 in the revised regulations was as follows:

Title 33 C.F.R., Section 209.200(e):

"(2) Section 13 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. § 407) authorizes the secretary of the army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the chief of engineers anchorage and navigation will not be injured thereby, within limits and under conditions to be prescribed by him. Although the department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the Rivers and Harbors Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. § 419). As a means of assisting the chief of engineers in determining the effect on anchorage of vessels, the views of the U. S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District."

Section 4 of the Rivers and Harbors Act of March 3, 1905, 33 U.S.C. § 419, as noted above, authorized the Secretary of the Army to prescribe regulations to govern the transportation and dumping into any navigable water of dredgings, earth, garbage, and other refuse matter of every kind whenever in his judgment such regulations are required *"in the interest of navigation."* (Emphasis added) The regulations of the Corps of Engineers until the issuance of new regulations regarding § 13 on April 7, 1971, consistently demonstrated that it regarded § 13 and 33 U.S.C. § 419 as virtually identical provisions to the extent that they provided that the preferred practice was to treat applications for permits under § 13 as applications under § 419.

Moreover the Corps of Engineers had issued an internal regulation concerning permits for discharge promulgated May 18, 1968, ER 1145-2-303, which states, inter alia, in 7(d):

> "The concern of the Department of the Army in industrial wastes under this program lies in the effect the suspended solids contained in the effluent from industrial outfalls have on the navigable capacity of the waterway. The Department is primarily concerned under this program with the shoaling of authorized improved navigation channels and in placing the responsibility and/or cost for removing these shoals on those industries that are causing them."

The United States now argues that PICCO should have disregarded this long-established position of the Corps of Engineers because of a change of policy that took place some time subsequent to 1968.

As we have noted, Section 209.200(e)(2) of the regulations was the only section which referred explicitly to § 13 at the time the alleged violation of PICCO took place. 33 C.F.R. 209.120(d)(1), on which the Government relies, did *not* cite § 13. It is true that this provision states "the decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest . . . ."

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*The position of the Corps of Engineers in this regard was fully justified, for the legislative history of 33 U.S.C. § 419, found at 39 Cong. Rec. 3230 (58th Cong., 3d Sess., Feb. 23, 1905), makes clear that § 419 was intended to provide for the implementation of § 13.

However, the inventory of "principal laws" administered by the Corps in § 209.120(b) did not include § 13. An announcement that "pollution, aesthetics, ecology and the general public interest" will be considered in connection with an application to the Corps for permission to dredge and fill in the navigable waters is not the equivalent of a statement that henceforth a permit will be required for an activity which has no effect on navigation.

It is also true that the memorandum of understanding dated June 13, 1967 between the Secretary of the Interior and the Secretary of the Army does refer to pollution problems which may arise from discharges permitted under the 1899 Act. However, since discharges with a tendency adversely to affect navigation may well have a pollutional effect, this reference to pollution does not prove that the Corps of Engineers had suddenly decided that § 13 was addressed to all discharges. Obviously the memorandum of understanding did not inhibit the Corps from promulgating its later internal regulations, ER 1145-2-303, the 1968 regulation referred to above, which indicated its concern was with suspended solids and navigation.

In the appendix to its brief, the United States cites press releases by the Corps of Engineers at Washington dated May 19, 1970 and July 30, 1970, apparently as support for the proposition that the Corps had changed its interpretation of § 13 and then and thereafter required permits for discharges such as that made by PICCO. It is by no means clear that these documents bear this interpretation. Moreover, the Government at no time offered evidence of the existence of these press releases, or of their publications, or that PICCO or any-

one else in Western Pennsylvania had actual knowledge of them. There is a serious question as to whether it is proper to charge a criminal defendant with constructive knowledge of material contained in a press release of unknown distribution and publication rather than in the *Federal Register, Hotch v. United States,* 212 F.2d 280 (9th Cir. 1954).

In summary, both PICCO and the Corps of Engineers at the time of the alleged criminal violations in this case had a well-founded belief that Section 13 had no application to a discharge with no tendency adversely to affect navigation and that therefore, no permit under § 13 was necessary for such a discharge. As a result, in the case of Section 13, conspicuously unlike related statutory provisions administered by the Corps, for example, 33 U.S.C. § 403, there was no permit program, no form of application, no form of permit, no administrative apparatus.

The Court of Appeals, even though willing to accept the "modern," post-1970 contention that § 13 has application to a discharge such as that of PICCO, was not willing to accept the irrational, absolutist position that the principal function of § 13 is to stand as a total bar to any and all discharges. Rather, it concluded that the object of § 13 is to permit discharges under controlled circumstances — that inherent in that objective is the requirement of a permit program — and that in the absence of the permit program which is an integral part of the statutory scheme, Congress did not intend criminal penalties to be assessed for the failure to possess a permit. Putting it another way, the Third Circuit reached the sensible conclusion that, even if the 1899 Act was capable of the interpretation of being more than

a statute to prevent obstruction to navigation, the crime Congress intended to create was that of making such a discharge without a permit, not of making *any* discharge —since "any discharge" is too vague a standard to be accepted as the measure of a crime.

II. The Construction of § 13 by the Court of Appeals Properly Resolved the Conflict Between § 13 and the Modern Federal Water Quality Legislation as It Existed at the Time of the Events Involved in This Matter.

It is obvious that if § 13 is read as being applicable to a discharge such as that of PICCO, then a conflict exists between the 1899 Act and modern federal legislation dealing specifically with water pollution as it existed prior to October 18, 1972.* In order to appreciate the resolution of the conflict by the Court of Appeals, it is first necessary to review the statutory provisions involved to understand the nature and extent of the contradiction.

The history of the federal water pollution legislation can be set forth succinctly. It originated in 1948 with the Water Pollution Control Act, 62 Stat. 1155. This Act charged the Surgeon General of the United States with the task of dealing with the problem of

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*E.g., W. Rodgers, "Industrial Water Pollution And The Refuse Act: A Second Chance For Water Quality," 119 U. Pa. L. Rev. 761, 820 (1971): ". . . the new procedures [referring to the 1971 permit program under the 1899 Act] represented a repudiation of the 1965 program as thoroughly as that year's enactment ignored the underlying philosophy of the 1899 Refuse Act."

water pollution. Although the Act did contain a provision whereby the Attorney General, within certain limitations, could bring an action to abate pollution, the Act contained no definitions or standards of what constituted "pollution" and was generally unenforced and unenforceable. Section 24 of the Water Pollution Control Act of 1948 expressly stated that Sections 13 through 17 of the Rivers and Harbors Act were not affected by its enactment. The Water Pollution Control Act Amendments of 1956, 70 Stat. 498, expanded the powers of the Surgeon General and specifically provided in Section 8(c) that in cooperation with state authorities he could convene conferences to deal with specific pollution problems, could provide state authorities with the results of such conferences, and could recommend that state action be taken to abate nuisances. Section 8(b) of the 1965 Amendments provided:

> "Consistent with the policy declaration of this chapter, state and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this subsection, *be displaced by federal enforcement action.*" (Emphasis added)

The avowed policy of the Water Pollution Control Act, after amendment in 1956, was thus to make abatement of pollution problems primarily a state concern. The 1956 amendments reenacted in Section 12 the provision of the original Water Pollution Control Act saving the effectiveness of the 1899 Rivers and Harbors Act, Sections 13 through 17. Neither the legislative history of the Water Pollution Control Act of 1948 nor that of the 1956 amendments elucidates in what manner Congress

envisioned the 1899 Rivers and Harbors Act and the Water Pollution Control Act would interact. However, it is clear from the reported cases that enforcement of § 13 had historically involved two types of cases — accidental discharges of oil and discharges of industrial solids, both of which genuinely interferred with the navigable use of waters. The reported cases show that this pattern of the use of § 13 remained true into the year 1970. There is nothing surprising in the decision of Congress not to allow its water pollution legislation to interfere with or impede the operation of § 13 in the circumstances in which it had been historically applied.

Water pollution control again received Congressional attention in 1961 and 1965. The Federal Water Pollution Control Act Amendments of 1961 empowered the Attorney General to bring actions in a federal district court without consent of a concerned state in any case in which the health of persons in a state other than that of the origin of the discharge was endangered, 75 Stat. 204, § 8(b). Actions where the effect of the discharge was limited to a single state could be brought with the consent of the governor of that state. In 1965 the Water Quality Act, 79 Stat. 903, amending the Water Pollution Control Act, effected a comprehensive revision of the federal water pollution legislation. For the first time, provisions for establishing standards were enacted as Section 5(c)(1). As provided in the 1965 Act, states which set standards for water quality which were acceptable to federal authorities in effect established the standards applicable in abatement actions in federal courts under the Water Pollution Control Act, because those "state" standards also became "federal" standards by virtue of the approval.

The then existing provision of the Water Pollution Control Act which "saved" the 1899 Rivers and Harbors Act was untouched by these amendments. No mention of this saving provision was made either in the text or legislative history of the 1961 amendments or the Water Quality Act of 1965. Section 107 of the Water and Environmental Quality Improvement Act of 1970, 84 Stat. 91, deleted a reference to the Oil Pollution Act of 1924, (which had been repealed by the 1970 Act) from the "savings" of the Water Pollution Control Act, but again there is no legislative history to suggest that the failure to change the language in the same savings clause as to the 1899 Act had any significance. There was certainly no affirmative indication of Congressional purpose with regard to coordination between the 1899 Rivers and Harbors Act and the Water Pollution Control Act.

The Government's argument at pages 20 and 21 of its brief that § 13 was "saved" because it provided an alternative enforcement procedure is contrived and unpersuasive. A more obvious and plausible rationale for the inclusion in the savings clause of the 1899 Act can be found in the fact that at the times when the savings clause was first drafted in 1948 (and at all times when it was subsequently reenacted)* it was generally understood (and presumably therefore, also by Congress) that § 13 was addressed to materials with a tendency adversely to affect navigation. Although all discharges which might be thought to pollute in the modern sense do not have a tendency adversely to affect navigation, many matterials with a tendency adversely to affect naviggation, *are* pollutants. It is only logical that Congress, in dealing

*Comment, "Discharging New Wine," supra, 33 U. Pitt. L. Rev. 483 at 521, Note 154.

with substances covered by the modern legislation as pollutants, would not want to abolish the remedies previously constructed for dealing with these same substances when they tended to affect navigation. In this connection, it must be remembered that Congress consigned primary responsibility for dealing with water pollution to the states. One might well choose to delegate control over the discharge involved in *Republic Steel, supra,* for example, to the states insofar as it was a pollution problem but retain federal remedies for dealing with it if it interfered with navigation.

That there is a conflict between the two statutory schemes under the Government's view of the 1899 Act is easily demonstrated. The Water Pollution Control Act, as it stood at the time of the alleged offenses in this information, provided for establishment of federal water quality standards (principally through state action), 79 Stat. 903, § 5(c)(1), and empowered the Attorney General to seek abatement of discharges which failed to meet these standards. Of course, discharges which did meet the applicable water quality standards were not subject to abatement under any provision of the Water Pollution Control Act. By contrast, Section 13 dealt with discharges of an undefined subject matter called "refuse" into navigable waterways. Although Section 16, the enforcement provision for § 13, 33 U.S.C. § 411, does not explicitly provide for an injunctive remedy, case law has established that the Attorney General possessed the power to seek and obtain injunctions in § 13 cases, see e.g., *United States v. Republic Steel Corp., supra.*

The synthesis of this legislation by the Government is that in 1970 the Attorney General had the pow-

er to obtain an injunction under the Water Pollution Control Act as to discharges which did not meet the standards established under that Act and the power to obtain an injunction against discharges which *did* comply with the Water Pollution Control Act standards, simply by seeking relief under the 1899 Act and not mentioning the modern scheme of water pollution control under the Water Quality Act of 1965. The result is, of course, incongruous and intolerable.

This interpretation would give a prosecutor license to disregard the carefully formulated legislation of this era by invoking the primitive prohibitory language of a statute of the last century at his unfettered discretion. If the Government's contention as to the relationship of the two statutes is correct, the water quality standards of the 1965 Water Quality Act are meaningless. The point is illustrated by the circumstances of the instant case in which the United States obtained a criminal conviction of PICCO for violation of § 13 despite PICCO's offer to prove its compliance with the standards set pursuant to the 1965 Water Qualty Act.

The Court of Appeals properly refused to approve such a result. It did not permit the efforts of Congress in providing for water quality standards in the 1965 Water Quality Act to be rendered pointless by the use of the 1899 Rivers and Harbors Act, which at the time of its enactment and today contains no water quality standards. Likewise, this Court must surely recognize that improvement of water quality in the 1970's is a problem of adjusting the economically and technologically possible to the environmentally necessary; it is not a goal to be reached by distortion of an act of the

past century into an absolute prohibition of any discharge, an absolute prohibition which invites discriminatory application.

The issue which faces this Court is one of the accommodating or reconciling the 1899 Rivers and Harbors Act with the Water Quality Act. This accommodation does not require a decision that the enactment of the 1965 Act repealed by implication certain provisions of the 1899 Act and we do not so argue.* Accommoda-

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*Yet the question has often been incorrectly so characterized. For example, in *United States v. Interlake Steel Corporation*, 297 F. Supp. 912 (N. D. Ill. 1969), a lower court case much cited by other lower courts in the Seventh Circuit, the information charged Interlake Steel Corporation, a codefendant in the earlier *Republic Steel* case, with discharging iron particles (mill scale) and an oily substance into the Little Calumet River. The defendant moved to dismiss the information. At page 916 of its opinion, the court dealt with the problem of the apparent conflict between the statutes. It characterized the defendant's argument as one that "Section 13 of the Rivers and Harbors Act is superseded and modified by the Water Quality Act of 1965" and "the Supreme Court's decision in *United States v. Republic Steel Corp., supra*, which held that a discharge into the Little Calumet River similar to the one alleged in the instant information violated the Rivers and Harbors Act cannot stand in light of the Water Quality Act." The court rejected that argument on three grounds. The first was the saving clause for the Rivers and Harbors Act in the Water Quality Act of 1965. The second was that the Water Quality Act of 1965 was intended to upgrade water standards. The third was that the discharges probably violated water quality standards in any event.

Interlake is clearly distinguishable from the instant case in the scope of the question to be considered. The amici here do not argue that the Water Quality Act of 1965 superseded the Rivers and Harbors Act of 1899

tion does involve coming to grips with the fact that criminal prosecution of a person for allegedly discharging "refuse" under 1899 Act, regardless of that person's compliance with the 1965 Water Quality Act, most dubiously serves the purpose of Congress in trying to resolve the difficult problem of water pollution in the United States. Specifically, accommodation in the present context requires the conclusion that before PICCO could be prosecuted under § 13, it should have had the opportunity to obtain a permit under § 13 on a showing that its discharge compiled with the standards set pursuant to the 1965 Water Quality Act. It is not presumptuous to suggest that this apparently was what President Nixon contemplated would be the practical

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or overruled *Republic Steel, supra*. Our argument is that the statutes must be accommodated so that they further rather than frustrate the intent of Congress.

We submit that the Illinois court *was* in error when it reasoned that the Water Quality Act of 1965 was intended only to secure higher water quality standards than the Refuse Act and therefore an accommodation of the two acts was not necessary or desirable to ameliorate the absolute prohibition of the Rivers and Harbors Act. If the Rivers and Harbors Act is an absolute prohibition of all discharges then the purpose of the enactment of the Water Quality Act is difficult to perceive. Obviously, however, the purpose of the latter act is to set standards for industrial discharge which recognize the reality that industrial use of water within defined limits established by such standards is vital and on the public interest, yet protect the quality of the nation's waterways.

Of course, the result in *Interlake* might have been correct on the ground that the discharge involved was similar to the discharge in the *Republic Steel* case and therefore was a hazard to navigation.

manner of operation of the 1899 permit program, had it ever been carried out, according to his executive message.

It is no answer to the problem of statutory accommodation outlined above to say that the meaning of the words in the savings clause as to the 1899 Act of the Water Pollution Control Act is "clear" and therefore they permit no interpretation. As Mr. Justice Frankfurter observed: "Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words." "Some Reflection On The Reading Of Statutes," 47 Colum. L. Rev. 527, 528 (1947). It is the function of the courts to give effect to the purpose of legislation and to develop statutory meaning rationally. Where two statutes appear to conflict in purpose and product absurd results if applied in a literal and narrow manner, it is an abnegation of the judicial function to observe that it is for the legislature to resolve the conflict and abandon the field. In the words of one authority:

> "To assume that accommodation or reconciliation of apparently conflicting statutes is work only for the legislature is to ignore the dynamics of legislative process. The problem, as it comes to the court, may have been unforeseeable at the time of legislative deliberation . . . Judicial accommodation can be accomplished only by ascertaining the purpose of each statute through an examination of the language, history and judicial gloss that has been placed on each." Wellington and Albert, "Statutory Interpretation And The Political Pro-

cess: A Comment On Sinclair v. Atkinson," 72 Yale L. J. 1547, 1551 (1963) (Footnote omitted)

This Court has very recently demonstrated the proper judicial role in preventing multiple statutes dealing with the same subject matter from producing an anomalous result in *Boys Market, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970). There the Court was faced with two flatly contradictory statutes: the provision of the Norris-LaGuardia Act, 29 U.S.C. § 104 which provides that the courts of the United States lack jurisdiction to issue injunctions in cases involving labor disputes, and the command of § 301 of the Labor Management Act, 29 U.S.C. § 185(a) which directs federal courts to take jurisdiction of cases involving labor disputes.

A pattern had developed involving the no-strike provision frequently found in collective bargaining agreements containing an arbitration clause. If a union struck in defiance of its promise to arbitrate, the employer would bring an action in a state court, seeking an injunction against the strike, and enforcement of the agreement to arbitrate. The injunctive remedy was available in many state courts. The union would remove under 29 U.S.C. § 185(a) to the nearest federal court, and the federal court, following the *literal* dictates of the Norris-LaGuardia Act, would refuse to enjoin the strike. The result was complete frustration of a Congressional purpose to resolve labor disputes peacefully.

While the two conflicting statutory provisions did not expressly refer one to the other, it was not possible to argue that the later-enacted provisions of the Labor

Management Relations Act had repealed the Norris-LaGuardia Act nor was that argument offered. The Court observed at 398 U.S. 250:

> "The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions [. . . citations]
>
> The Norris-LaGuardia Act was responsive to a situation totally different from that which exists today."

Unwilling to frustrate the Congressional purposes of peaceful settlement of labor disputes by a literal reading of the quite clear language of the Norris-LaGuardia Act that federal courts were not to grant injunctions in labor disputes, this Court concluded, ". . . that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy" (of resolving labor disputes peacefully.) 398 U.S. at 253.

The present case presents the same sort of conflict for judicial resolution. In the summer of 1970, it was the evident policy of Congress to establish control of water quality by a process of definition of the problem, erection of standards, discussion with concerned industries in conference and before hearing boards, and finally abatement as a last resort where compliance

was not achieved through other than legal action. It was a policy in which states were to play the primary role. Where a corporation was in compliance with both state and federal standards, and was proceeding on a schedule to improve pollution control equipment as was PICCO in the instant case, no proper purpose was served by a criminal prosecution of it under the 1899 Act. This Court should affirm the conclusion of the Court of Appeals that the prosecution of PICCO on the facts of the present case was not desired or even contemplated by the Congresses which passed Section 13 or the several modern water pollution control statutes.

In this connection it is significant that the comprehensive Water Quality Act Amendments of 1972 spell out a procedure with regard to Section 13, and permits, which is most similar to the result of the decision of the Court of Appeals and manifestly reflects the policy consideration argued in this brief.

III. The Conviction of Picco Under the Information Involved in This Matter Constituted a Denial of Due Process of Law Because of the Confusing and Misleading Actions of the United States with Regard to Water Quality Standards and the Scope of Section 13.

The due process clause of the Fifth Amendment measures statutory provisions which define certain conduct as criminal. To square with its requirements, a statute must convey adequate warning to men of reasonable intelligence; it must not be so indefinite or contradictory that one who would obey the law must necessarily guess at what is and is not prescribed. ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (Footnote omitted). This proposition has been recognized in such other cases as *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961), *Champlin Rfg. Co. v. Corporation Commission*, 286 U.S. 210, 243 (1932), and *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

A criminal statute should not be read in isolation. Statutes which refer to the criminal provision under which the charge is framed or deal with the same subject matter must be considered as well in testing the statute for compliance with demands of due process. In

Schact v. United States, 398 U.S. 58 (1970), this Court pointed out that the validity of the narrow statutory provision under which the indictment had been framed had to be considered in light of other pertinent statutory provisions:

> "Our previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face. [Citation] . . . . But the general prohibition of 18 U.S.C. § 703 cannot always stand alone in view of 10 U.S.C. § 772, which authorizes the wearing of military uniforms under certain conditions . . ." 38 U.S. 58, 61 (1970).

In *International Harvester Co. of America v. Kentucky,* 234 U.S. 216 (1914), the Court examined three separate statutes and the state constitution to determine the applicable principles of law.

The provisions of § 13 likewise cannot be read in isolation, but instead must be tested in the context of other laws applicable to discharges into navigable water, specifically the Water Quality Act of 1965, amending the Water Pollution Control Act of 1948. *Schact* and *International Harvester* are an ample answer to the argument that a statute cannot be rendered unconstitutional by the effect of other legislation dealing with the same subject matter.

As noted above, the Water Quality Act of 1965 provided that states might establish water quality standards which, when approved by federal authorities, would become federal standards. In the case of the Monongahela River, the standards set by the Common-

wealth of Pennsylvania were accepted as the federal standards in 1967. 40 C.F.R., Ch. I, part 120.10. Discharges which fell outside the established standards were subject to abatement under § 5 of the Water Quality Act of 1965 and § 8(f) of the Federal Water Pollution Control Act Amendments of 1961. Procedures for notification of violation, for holding a conference before a hearing board and for reviewing applicable water quality standards are set out as preliminary steps in achieving compliance without resort to legal action by the Attorney General. Although the Water Pollution Control Act, as amended, did not explicitly so state, discharges which *did* comply with the water quality standards set pursuant to it were not subject to abatement under any of its provisions. This statutory framework is a realistic approach to a complex, important problem. Our industrial age has brought with it the discharge of by-products and waste materials into our waterways. The approach to the problem adopted by Congress in the Water Quality Act of 1965* was (a) to recognize that a certain amount of discharge is inevitable under the current state of technology and economy, (b) to define standards of water quality beyond which discharges are unlawful and hence subject to abatement as nuisances, and (c) to enforce these standards, all the while exploring the possibilities of improving the standards and lowering the amount of pollutants permitted in the necessary discharges. The implication of the Water Quality Act was that discharges which met or bettered the existing water quality standards were lawful, at least until the standards were raised.

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*And continued in the Federal Water Pollution Control Act Amendments of 1972.

On the other hand, § 13 purports to make discharge of "refuse" of any kind or matter not only unlawful and hence subject to abatement, but criminal as well.

As we have already pointed out, if § 13 is given the meaning which the Government argues for in the instant case, persons or corporations causing discharges of any kind into navigable waterways prior to the creation of the permit program in 1971 were criminally liable, despite the fact that the discharges were fully in compliance with the water quality standards of the Water Quality Act of 1965. The bizarre result would follow because the two statutes, combined into a single paragraph would read approximately as follows:

> "States have the primary responsibility for establishing water quality standards. Where states have established standards acceptable to the Administrator of the Environmental Protection Agency, those standards are federal standards as well. If, however, a state does not adopt standards, or adopts inadequate standards, then the Administrator of the Environmental Protection Agency may prescribe standards by regulation. All discharges which fail to meet the applicable standards of this section are nuisances and are subject to abatement by the Attorney General if compliance cannot be achieved by conciliation and negotiation before a hearing board. All discharges of refuse or matter of any kind into navigable waterways are criminal acts and are here condemned as misdemeanors, provided further that the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit discharges upon application to him."

What meaning does this composite statutory scheme convey to a man of common intelligence? The inconsistency is patent; discharges which meet applicable water quality standards are not nuisances and are not subject to even the civil remedy of injunction in abatement, and yet the same discharges are criminal and subject the actor to fines and imprisonment. A statutory scheme so inconsistent that a reasonable man does not know what is proscribed and what is approved violates the requirements of due process.*

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*Indeed, the Director of the Environmental Protection Agency has recognized this difficulty. In an Interview with William Ruckelshaus, published in the May, 1971 issue of *Environmental Science and Technology* under the caption, "A Candid Conversation With The First Administrator Of The Environmental Protection Agency," the following exchange took place at page 392:

[QUESTION]

"Isn't there overlapping federal jurisdiction on enforcement already under the Refuse Act and the Federal Water Pollution Control Act?"

[ANSWER BY MR. RUCKELSHAUS]

"The laws almost contradict one another. Under the 1899 Refuse Act, it is against the law to dump refuse into the navigable waters or their tributaries without a permit. The Federal Water Pollution Control Act specifies the setting of standards by the states and approval by the federal government. Under the 1965 act, the people are to comply with the water quality standards; it says nothing about discharge into a stream being illegal.

"It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream."

In *United States v. Evans,* 333 U.S. 483 (1948), this Court was faced with a federal criminal statute which was internally inconsistent. The defendant had one interpretation of the statute; the government had another. Both were possible and reasonable constructions of the wording of the statute. The straightforward approach of this Court was simply to refuse to apply the statute to the defendant. No mention of due process was made, the Court being of the view that it could not apply the statute if it did not know what it meant. It seems evident that the application of such a statute would be a clear violation of due process.

In *United States v. Cardiff,* 334 U.S. 174 (1952), the statutory provisions involved were found contradictory. There the majority observed:

> "We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice." 344, U.S. 174, 176.

Other cases in which this Court has simply refused to apply a criminal statute for reasons of vagueness, indefiniteness or uncertainty include *Pierce v. United States,* 314 U.S. 306 (1941), *McBoyle v. United States,* 283 U.S. 25 (1931), and *United States v. Weitzel,* 246 U.S. 533 (1918).

That there was a conflict between the Water Quality Act of 1965, as amended, and § 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 as the Government interprets it, is an irresistible conclusion. The former informed the would-be, law-abiding citizen that

"conduct X is approved if it meets certain standards." The latter informs the citizen that "conduct X is totally proscribed, on pains of criminal penalties." The result was an indefiniteness and confusion that is fatal under due process requirements.

Courts which have written decisions in recent prosecutions brought under § 13 have recognized the anomaly in such prosecutions. In *United States v. Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me. 1971), the court observed at page 688:

> "The Court has great sympathy with the plight of an industry which, while endeavoring in good faith to comply with water quality standards approved by the Secretary of the Interior under the FWPCA, is subjected to criminal prosecution instituted by the Department of Justice under the Rivers and Harbors Act."

The court for the Northern District of Indiana in *United States v. United States Steel Corp.*, 328 F. Supp. 354 (N. D. Ind. 1970), at page 358 stated:

> "The Court has considerable sympathy for defendant's position. The result *is* incongruous, and perhaps unjust." (Emphasis in original)

In its brief, the United States insinuates that PICCO was convicted in the District Court because it chose to "flout" the 1899 Act. A brief reflection demonstrates the fatuity of this contention. Entities like PICCO and the amici which have made substantial expenditures for water pollution control equipment in order to meet water quality standards and comply with state permit requirements and which obtain permits from the Corps of Engineers for construction in

the navigable waters in connection with their manufacturing establishments would hardly have failed to obtain § 13 permits for industrial waste discharges like those involved in the instant case had they been given reasonable notice that such permits were required. A reasonable man can only conclude that PICCO was prosecuted and convicted before the District Court because it was misled as to what was required of it.

This Court should recognize the anomaly in the instant prosecution and apply well settled principles of law to affirm the conclusion of the Court of Appeals that prosecution in these circumstances denies due process.

IV. The Affirmance by This Court of the Lower Court Holding Is Rendered Less Significant Generally by the 1972 Amendments to the Water Quality Act.

As we noted in our brief opposing the grant of certiorari in this case, the decision of the Court of Appeals would appear to be literally applicable only to discharges which took place prior to the institution of a permit program by the Corps of Engineers on April 7, 1971. In its petition for certiorari, the United States indicated that 115 criminal cases brought since 1970 remain pending; it does not indicate what fraction of those are affected by the *PICCO* decision. We submit that deep concern over the impact of the holding in this case on other Government prosecutions of those in the position of PICCO is neither justified, nor a proper judicial consideration.

This is particularly so because of the fact that on October 18, 1972 the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. § 1251 et seq., (the "Amendments") became law. The Amendments have a significant effect on § 13. For example, 33 U.S.C.A. § 1342(a)(5) provides that no permit shall be issued under § 13 subsequent to October 18, 1972. It further provides that each application for a permit under § 13 pending on October 18, 1972 shall be deemed to be an application for a permit under § 1342. Section 1342(a)(1) provides that the Administrator of the Environmental Protection Agency may issue a permit for the discharge of pollutants upon a finding that the discharge will meet standards to be set pursuant to other provisions of the Amendments. Finally, Section 1342(k) provides that:

> "Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) [the Amendments] . . . or (2) [§ 13] . . ., unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application."

The Amendments make clear that the PICCO decision will neither affect present enforcement of the federal legislation designed to improve water quality nor present enforcement of § 13. The United States confirmed this in its Memorandum opposing the grant of the Petition for Certiorari in *T. W. Guthrie v. Alabama By-Products Co.*, No. 71-1672 in this Court, where it argued that:

> "The question whether riparian owners can sue under Section 13 of the Refuse Act for damages to their riparian interests is of limited importance in view of the recent enactment of the Federal Water Pollution Control Act Amendments of 1972."

The lack of future significance of the *PICCO* decision would be alone an appropriate reason for this Court to dismiss the writ of certiorari as improvidently granted. Moreover, the reconciliation of § 13 with the modern water quality legislation in the 1972 Amendments is so similar to that reached by the Third Circuit Court of Appeals as to confirm the correctness of its decision without the need for extended analysis.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the event the Court elects to reach the merits of this controversy, the decision of the United States Court of Appeals for the Third Circuit should be affirmed.

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APPENDIX "A"

Section 6 of the Rivers and Harbors Act of 1890 provided:

"That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadsted, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other materials used, or to be used, on or toward the building, repairing or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be

erected on the banks or sides of any port, harbor, basin, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement mose judicious and practicable and for the best interest of such improvements, or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is authorized to grant, in any place designated by him where navigation will not be obstructed thereby." 26 Stat. 426.

Section 6 of the Rivers and Harbors Act of 1894 provided:

"It shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than in the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy or injure in any manner whatever any seawall, bulkhead, jutty, dike, levee, wharf, pier, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks;

any and every such act is made a misdemeanor, and every person knowingly engaged in, or who shall knowingly aid, abet, authorize, or instigate a violation of this section shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than twenty-five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to the conviction of the misdemeanor." 28 Stat. 363.

APPENDIX "B"

The following relevant debate took place at 26 Cong. Rec. 4358 53rd Cong. 2d Sess. (1894):

"*Mr. Ray*: I notice first that there are 50 pages of appropriations in this bill, and then there are about 25 or 30 pages of general legislation on this subject of navigation, etc., having nothing to... do with the improvements provided for in the bill. Now . . . I would like to know why . . . all this general legislation on these subjects is put in an appropriation bill appropriating money for the improvement of rivers and harbors?

"*Mr. Grosvenor* [A member of the Rivers and Harbors Committee and floor manager of the appropriations bill]: These items of general legislation have been suggested either by the Corps of Engineers, or by bills introduced on this floor and referred to the Committee on Rivers and Harbors. Incidental to the appropriation certain other considerations arise, and I may as well go directly to one case which will illustrate the whole question. The Chief of Engineers estimates a certain amount of money as being required for the dredging of New York harbor. In that same connection he informs the Committee that the existing legislation is inadequate to protect that harbor from the dumping, in violation of existing law, of the refuse matter of the City of New York into the navigable waters of the harbor. A very elaborate report was presented to the Committee on that subject, and it may be remembered that one Representative of the City of New York attempted to ingraft this

same legislation upon another appropriation bill, probably the sundry civil bill.

"The matter was pending and was incorporated in this bill, and it is germane . . . to the appropriation for the dredging of New York harbor; for surely it is as important to prevent the filling up of a harbor by artificial means as it is to dredge out of that harbor the materials which have been deposited there, whether by artificial or by natural causes.

"*Mr. Ray*: Then . . . the position of the Committee on Rivers and Harbors is that whatever legislation [touches] rivers and harbors . . . or anything that has water in it or about it, is to be put into the Appropriation Bill?

"*Mr. Grosvenor*: Not quite all of it . . . We limit ourselves in this way. *We have nothing to do with the light-houses or with any other matters that comes under the jurisdiction of the Committee on Commerce, but, so far as regards the protection of the channels of navigation, and protection of the shores from erosion and all matters of that kind, our jurisdiction covers them, and certainly it covers the questions of filling up of the navigable waters by deposits made in harbors or in rivers, and of the establishment of harbor lines, matters which relate strictly to the improvement and maintenance of navigation.*

"*Mr. Ray* [Referring to the "general legislation" of the Appropriation Bill]: You have provided in this bill or have provided heretofore enact-

ments which will prevent the *discharges or deposit of refuse matters in rivers and harbors where it will obstruct navigation?*

"*Mr. Grosvenors Yes, sir.*" (Emphasis added)
